

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1495

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

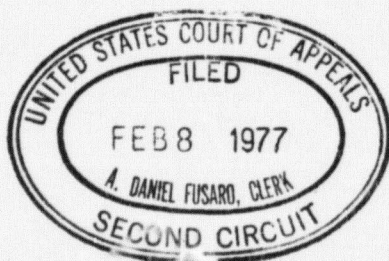
EUGENE SCAFIDI, BARRIO MASCITTI,
ANTHONY DIMATTEO, SAVERIO CARRARA,
MICHAEL DELUCA, JAMES NAPOLI, JR.,
JAMES V. NAPOLI, SR., ROBERT VOULO,
and SABATO VIOLATO,

Defendants-Appellants.

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Docket No. 76-1495

BRIEF FOR APPELLANT
BARRIO MASCITTI

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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EUGENE SCAFIDI, BARRIO MASCITTI,
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BRIEF FOR APPELLANT
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the numerous breakings and entries into Apartment 309 and the Hiway Lounge without any judicial authorization were illegal and require suppression of all conversations seized.
2. Whether the initial application to intercept oral communications at Apartment 309 failed to establish probable cause that Apartment 309 was being used in connection with a violation of 18 U.S.C. §1955.

3. Whether the unreasonable and unexplained delays in the sealing of the 309 tapes require suppression of all conversations seized.

4. Whether the Government's unexplained failure to file timely progress reports compels suppression.

5. Whether suppression of the conversations monitored in Apartment 309 mandates a reversal of the conviction against appellant Mascitti on Count III (the Hiway Lounge count).

6. Whether the prejudicial variance in both the conspiracy count and the Hiway Lounge count requires reversal of the judgment of conviction.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Mishler, Ch.J.) entered October 15, 1976, convicting appellant Barrio Mascitti after a jury trial of knowingly conducting an illegal gambling business, in violation of 18 U.S.C. §1955, and sentencing him to three years' imprisonment, appellant to serve two months, with execution of the remaining sentence suspended and appellant placed on probation for 34 months.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act. Mascitti was admitted to bail by the district court pending determination of the appeal.

Statement of Facts

I. The Principal Charges

By an indictment filed June 29, 1976, appellant Bario Mascitti and 21 other co-defendants were charged with various violations of federal law, including obstruction of justice, racketeering, conducting an illegal gambling business (18 U.S.C. §1955), and conspiracy.* Prior to trial, the district court severed the counts of the indictment charging racketeering, and the Government proceeded against Mascitti and 19 co-defendants on the four gambling-related counts.**

A. The Three-legged Conspiracy

All 20 co-defendants were charged in one count (hereinafter Count IV) with conspiring, from February 26, 1971, to the date of the indictment, to conduct, finance, manage, and supervise a continuous gambling enterprise. The Government's theory was that the conspiracy was a single massive "numbers" operation,

*The indictment is set forth at A.18 in appellants' separate joint appendix.

**The record of this trial is more than 7,000 pages long, with an additional 800 pages of suppression hearing testimony and literally hundreds of pages of affidavits and orders. Because of the magnitude of the record and the number of substantial issues raised by this case, it is impossible to include in the Statement of Facts all facts relevant to Mascitti's claims and still adhere to the page limits set by this Court for appellate briefs. Accordingly, the following Statement of Facts is intended to alert the Court to the principal issues raised at trial and the most significant facts concerning those claims. Additional factual material will be set forth in the argument section of Mascitti's brief.

containing from three to six "legs," linked by the presence in all the "legs" of James Napoli, Sr. (T.5587, 5712*).

"Leg I" -- the "Brooklyn Leg" -- was alleged to have operated from at least 1971 to 1974, and to have involved the following people: at the head of the operation was James Napoli, Sr.; directly below him was Michael DeLuca, Jr.; as "controllers" and "bank workers," persons who computed or delivered the policy work, were defendants Riccardi, Scafidi, DiMatteo, D'Avanzo, Annarumo, Simonelli, and appellant Mascitti (T.5588-5599). Mascitti was not alleged to have participated in any other leg of the conspiracy.

"Leg II" -- the "Yonkers Leg" -- allegedly involved a numbers operation located initially in Westchester County in 1971, which also allegedly operated from 1971 to 1975 in Brooklyn. Allegedly implicated in this leg were Napoli, Sr., and Napoli, Jr., as the heads; Frank Pinto, as a bank worker in Yonkers (evidence against this worker ceased in 1971); co-defendants Pirone, Altese, D'Avanzo, and Riccardi as bank workers at various times; and Lotierzo, Mascuzzio, Carrara, and Vigorito, who performed various roles in the enterprise (T.5599-5610, 5624-5631).

A number of defendants were also alleged to have participated in a third leg, "Leg III." It operated principally in New Jersey during April and May 1973. In it, Napoli, Sr., par-

*Numerals in parentheses preceded by "T" refer to pages of the trial transcript.

ticipated as a partner or consultant with co-defendants Casella, Rossi, and Radziewicz (T.5616-5618).

B. The Substantive Counts

In addition to the conspiracy, the Government charged three substantive counts of operating a gambling business, in violation of 18 U.S.C. §1955.

The first substantive count (hereinafter Count I, or the East Second Street count) charged defendants Annarumo, D'Avanzo, Scafidi, Voulo, and others known and unknown (all participants of Leg I of the conspiracy) with operating an illegal business from March through July 1972. The principal evidence against the defendants on this count was a seizure of gambling materials from 967 East Second Street in Brooklyn, New York.

The second substantive count (hereinafter Count II, or the "Apartment 309" count) charged defendants DiMatteo, Riccardi, Scafidi, Voulo, appellant Mascitti -- and only those five (again, all participants in Leg I of the conspiracy) -- with operating a gambling business from December 13, 1972, to March 9, 1973. The evidence against the five defendants on this count came almost exclusively from conversations monitored by a "bug" placed in an apartment ("Apartment 309"), allegedly used by Mascitti and DiMatteo as a "bank" for computation of numbers activities. The propriety and manner of execution of the electronic surveillance in Apartment 309 is a principal issue in this appeal.

In the final substantive count (Count III, or the "Hiway

Lounge" count), appellant Mascitti and 11 other of the defendants (participants in all three of the Government's alleged "legs") were charged with operating a gambling business from April 13 to June 15, 1973. The principal evidence to support this charge came from conversations monitored via a "bug" surreptitiously placed in the Hiway Lounge -- the alleged headquarters of Mr. Napoli's enterprises. The legality of these interceptions is also a principal issue on appeal.

C. Disposition of the Charges

Following a three-day suppression hearing, the district court held that the conversations were lawfully intercepted. Trial began on July 6, 1976, and continued for six weeks. At the close of the Government's case, Judge Mishler found that the Government had proved at least two conspiracies and probably three, that the New Jersey conspiracy was a separate venture on Mr. Napoli's part, in which he played a different role and which had as its object a different purpose -- violation of New Jersey law (T.5713). The court also found that Leg II, the "Yonkers" leg, was a separate conspiracy from Leg I. The conspiracy count was therefore dismissed (T.5711-5714).* Whether the spillover effect of the evidence introduced on the dismissed conspiracy count tainted the jury's determination on the substantive counts is an issue on appeal.

*The opinion of the district court, finding multiple conspiracies, is set forth at A.145 in appellants' separate joint appendix.

While the court dismissed the conspiracy count, it refused to dismiss the substantive count (Count III) which contained most of the defendants and at least two of the legs, and instead dismissed that count only as to defendants Annarumo and Cassella (T.5731, 5746-5749). The three substantive counts were submitted to the jury on August 19, 1976, and on August 24, 1976, the jury returned, convicting appellant Mascitti and six other defendants on Count III (the "Hiway Lounge" count). On Count II (the "Apartment 309" count), the jury convicted Mascitti and three other defendants. However, since the indictment charged only five persons with the crime, and since proof of the guilt of all five was required for conviction under 18 U.S.C. §1955 but only four were convicted, the district court dismissed the charge on the date of sentence. Despite the court's dismissal of this count, the evidence introduced against appellant Mascitti on the Apartment 309 count is relevant, as it was admissible for consideration on Count III -- the Hiway Lounge count -- and had a significant impact on the jury's decision on that count.

II. The Electronic Surveillance

The seized communications that formed the principal proof of guilt in Counts II and III were intercepted pursuant to six court orders involving two locations. On December 8, 1972, Judge Judd signed an order authorizing the interception for 15 days of oral communications occurring in Apartment 309 at

8-15 27th Street in Queens, an apartment leased to a single woman, Phyllis Engert, but allegedly being used by appellants Mascitti and DiMatteo as a policy bank. On January 15, 1973, several weeks later, a second order (309-II) authorizing interception for 15 days in the same apartment was signed. On February 20, 1973, a third order (309-III) was approved, authorizing wire surveillance at Apartment 309 and the institution of a second wiretap at the home of Scafidi (see Memorandum Opinion of Judge Mishler on Motion to Suppress, hereinafter "Mem. Op.," at 3-4).*

As a result of the materials secured by the 309 surveillance, the Government sought and received three authorizations to monitor conversations in the Hiway Lounge. The first order (Hiway-I) was granted by Judge Bartels on April 12, 1973; the second (Hiway-II) was issued on May 3, 1973; and on May 24, 1973, Judge Neaher issued a final order (Hiway-III) authorizing surveillance (Mem. Op. at 4-5).**

Mascitti's voice was intercepted repeatedly during the 309 monitoring, and was also intercepted during the monitoring at the Hiway Lounge.

In the court below, Mascitti raised or joined in various challenges to the orders. A suppression hearing was held, and

*The opinion is set forth at A.82 in appellants' separate joint appendix.

**On consent of the Government, the conversations seized pursuant to the Hiway-III order were suppressed for failure to timely seal the tapes, and the facts surrounding this final surveillance are not relevant to this appeal.

on October 14, 1976, the court issued a lengthy opinion upholding the legality of the orders. The following is a brief summary of the principal claims advanced by Mascitti as developed in the suppression hearing and the affidavits and orders relating to the electronic surveillance.

A. Surreptitious Entry

None of the applications to intercept oral communications at Apartment 309 or the Hiway Lounge contains any statement that the manner of interception was going to be by a device physically required to be placed inside the apartment or the lounge. The applications contain no request for authorization to enter the apartment or lounge to plant the devices, nor do any of the surveillance orders contain any authorization to trespass or to break and enter.*

Testimony in the suppression hearing showed that the agents placed the monitoring devices in Apartment 309 during the afternoon of December 8, 1972 (H.72-73**), secretly entering the apartment by means of a passkey obtained from the building superintendent (H.326). During the pendency of the orders, the agents again entered surreptitiously to move the bugs (H.333),

*In fact, the only request in the orders relating to placing the devices was a request in the 309-I order for the assistance of the telephone company in installing the devices, a request that was not granted (see application and order for 309-I surveillance, appellants' separate joint appendix at A.237-240).

**Numerals in parentheses preceded by "H" refer to pages of the transcript of the suppression hearing.

and a third covert entry was undertaken to remove them (H.332). The record does not indicate that Judge Judd was aware, prior to the first entry, that covert entry would be attempted, and there is no evidence that any other judge was consulted in even an informal manner prior to the other entries to Apartment 309.

Installation of the eavesdropping devices in the Hiway Lounge was accomplished by nighttime covert entry on April 12, 1973, without any specific judicial authorization, by means of a passkey (H.70).^{*} At the suppression hearing, the Assistant U.S. Attorney claimed that, prior to obtaining the Hiway-I order, he had informally alerted Judge Bartels of the Government's intent to enter the building surreptitiously. However, no testimony was taken at that time, and no specific order of authorization was issued (H.498-499). A second covert entry to move one of the microphones occurred during the pendency of the Hiway-I order; this time, no judge was made aware, even informally, of the proposed entry. Following expiration of the Hiway-I order, and before approval of the Hiway-II order, the Government sought and received an order signed on May 2, 1975, by Judge Judd, that permitted entry to rejuvenate the batteries. Finally, at least one more covert entry occurred during the pendency of Hiway-II or Hiway-III (H.70-71).

Appellants alleged that there was no statutory authority

^{*}The key was not obtained from a landlord or other person associated with the building; the record indicates that the agents simply took an impression of the lock to make the key.

to break and enter, and that, in any event, specific court authorization was necessary before breaking and entering could occur. The court sustained the legality of these covert entries on two grounds: First, the court held, in effect, that only individuals with proprietary interest in Apartment 309 or the Hiway Lounge could contest the entries. With respect to Apartment 309, the court found that although Mascitti had a key to the apartment and paid for the use of the premises, such payments gave him only a license to use the premises during the day, and that he and all other co-defendants were without standing to contest the entries (Mem. Op. at 47-48).*

Having avoided deciding the difficult problems posed by the Apartment 309 entries, the court found that only James Napoli, Sr., had standing to contest the Hiway Lounge entries. The court then determined that where probable cause exists to authorize a surveillance warrant, there is implicit authority to break and enter if the Government chooses to monitor conversations by placing listening devices inside a premises (Mem. Op. at 48-55). Regretably, the court then simply ignored the subsequent unauthorized entries into the Hiway Lounge.

B. Probable Cause to Believe that Apartment 309 Was Being Used
in Connection with a Violation of 18 U.S.C. §1955

The initial surveillance at Apartment 309 played a crucial

*This conclusion was reached despite the fact that the record shows that the initial 309 entry occurred during the day.

role in the evidence introduced at trial. As well as serving as the predicate for the issuance of 309-II and 309-III, the surveillance was the principal underpinning for the issuance of the Hiway-I order (see affidavit of Charles Parsons for Hiway-I order at 4-10). Accordingly, the probable cause to issue the initial 309 order was a significant issue in the court below.

Apartment 309 was leased to and occupied by a single woman, one Phyllis Engert. The apartment was located at 8-15 27th Avenue in Queens, a large, highrise apartment building with over 100 apartments (H.399). The Government concededly had no reason to believe that Engert was involved in gambling, and made no claim of probable cause to intercept her conversations. The basis of interceptions, rather, was principally appellant Mascitti's presence in the apartment, coupled with evidence that he was, indeed, involved in gambling.

The affidavit submitted by Agent Parsons shows that during the afternoon of November 14, 1975, Mascitti was observed by the building superintendent, Michael Mars, entering Apartment 309 by use of a key (see H.257-258).

Surveillance testimony also showed Mascitti or his automobile in the vicinity of 8-15 27th Avenue on three other days (see ¶¶38-42, Parsons affidavit for 309 order).^{*} In addition, the affidavit alleged facts showing Mascitti's involvement in gambling, including a seizure of gambling records and frequent

^{*}Agent Parsons' affidavit is set forth at A.240-268 in appellants' separate joint appendix.

entries to and exits from locations believed to be policy banks (see ¶¶7-38, 43, Parsons' affidavit). The court held that Mascitti's previous connection to gambling activities, the surveillance testimony, and the agent's expertise were sufficient to establish probable cause that Apartment 309 was being used as a "bank" for gambling activities (Mem. Op. at 7-11).

C. Delay in Sealing the 309 Tapes

The record reveals the following delays in sealing the tapes from Apartment 309:

<u>Order</u>	<u>Expired</u>	<u>Sealing</u>	<u>Delay</u>
309-I	12/23/72	1/16/73	24 days
309-II	2/ 1/73	2/ 5/73	4 days
309-III	3/ 9/73	3/16/73	7 days

Appellants argued below that the delays required suppression of the conversations seized. The court below disagreed, holding first that the delays in sealing the 309-I and 309-II tapes were excusable because 309-II and 309-III were merely extensions "in fact" of 309-I, permitting sealing of the tapes at the completion of the 309 orders (Mem. Op. at 35-41).^{*} Finally, the district court found the seven-day delay in sealing the tapes following the expiration of the 309-III order reasonable where the defense failed to raise any claim of tampering with the tapes (Mem. Op. at 42).

^{*}This conclusion was reached despite the fact that the 309-II and 309-III orders were treated by the Government as original orders, not extensions, and that the Government struck the word "continuing" from its request for 309-II and 309-III (H.491, 494, 542).

D. Delay in Filing Progress Reports and Notice of Inventory

All orders authorizing interception at Apartment 309 and the Hiway Lounge required the submission of progress reports to the issuing judge on the fifth and tenth day following each order (Mem. Op. at 26). The record shows that the Government failed to comply with a single one of the orders directing the reports. In fact, reports were filed late, were backdated, and some of the ordered reports were not filed at all. (See Mem. Op. at 26 & n.8, and progress reports included in supplemental record.) The court below held that the purpose of the reports was to insure judicial monitoring; that such function was served by the close scrutiny given to the applications for extension orders; that no prejudice resulted from the Government's failure to comply with the court orders; and that suppression therefore was an inappropriate remedy for the Government's non-compliance with the court orders (Mem. Op. at 26-29). The court reached a similar conclusion -- that there was no prejudice, therefore no suppression -- regarding the Government's totally unexplained 90-day delay beyond that permitted by Title III in serving notice of inventory on the Apartment 309 interceptions (Mem. Op. at 43-46; H.406-409).

III. The Trial

A. Evidence Pertaining to Count III (The Hiway Lounge Count)

Count III of the indictment -- the only count upon which appellant Mascitti was ultimately sentenced -- charged 12 in-

dividuals with conducting an illegal gambling business between April and June 1973. The evidence admitted at trial specifically related to the two-month period came almost entirely from two sources: first, surveillance testimony showing the defendants in or about the Hiway Lounge during April, May, or June (see, e.g., T.274-280, 396, 546-552, 728-738, 809, 1059, 1269-1272, 1874-1880, 2267, 2274-2279); and second -- the crucial evidence -- the conversations intercepted at the Hiway Lounge on approximately 18 different dates, from April 18 to May 17, 1973. According to the Government, these tapes showed all of the defendants at various times discussing aspects of the numbers business, such as winning numbers, picking up work (T.3627-3647, 3988-3990, 4061-4066), workers in the business (T.3543-3564), or the police (T.3791-3796, 4323-4238, 4431, 4700).

Although there was a vast quantity of evidence submitted on this count, the evidence specifically related to appellant Mascitti was surveillance testimony showing him near or at the Hiway Lounge on a few dates (e.g., April 14, April 17, May 11) (T.732, 815, 1271, 2276), and a single incriminating conversation -- on May 11, 1973 -- in which Mascitti, DiMatteo, and DeLuca were alleged to have participated. The trio were allegedly intercepted in a conversation with Napoli, Sr., and others concerning when the "late work" comes in (T.5479-5517). According to the Government, in this conversation Mascitti and DiMatteo indicated longtime involvement as "bank workers" in the numbers business (T.6094-6107). Through cross-examination,

Mascitti denied his participation in the May 11 conversation (T.5469-5477, 5527-5533).

B. Evidence Relating to Count II (The Apartment 309 Count)

While the evidence of guilt against appellant Mascitti on the Hiway Lounge count occupied a fraction of the Government's proof on that charge, a substantial quantity of evidence was produced to prove Mascitti's guilt on the count alleging his participation in a numbers "bank" located at Apartment 309 (Count II). Surveillance testimony was admitted that indicated that on numerous occasions between December 8, 1972, and February 2, 1973, Mascitti and DiMatteo were seen entering 8-15 27th Avenue (T.292, 295, 542, 893, 1852, 1855-1856, 1861, 1862, 1863, 1867, 2069-2070).

The Government also admitted conversations occurring on December 9, 1972 (2814-2835); December 14, 1972 (2851-2862); December 19, 1972 (2864-2871); January 18, 1973 (2875-2876); January 29, 1973 (2877-2901); December 11, 1972 (2907-2928); December 13, 1972 (2931); January 19, 1973 (3012-3014); January 27, 1973 (3014-3021); December 15, 1972 (3051-3072); December 20, 1972 (Mascitti's voice only) (3076); December 21, 1972 (3128-3133); January 16, 1973 (3136-3138); January 25, 1973 (3138-3140); December 22, 1972 (3164-3171); December 16, 1972 (3216-3238); and January 20, 1973 (3241-3265), allegedly involving Mascitti and DiMatteo in discussions of "hits," "overlooks," and other numbers terminology.

As a result of the 309-III authorization to tap Scafidi's telephone, the Government also introduced allegedly incriminating conversations among Scafidi, Voulo, and Mascitti (T.2653-2657, 2659-2664, 2668-2775, 2687, 2711-2718, 2726-2734, 2736). Finally, as prior similar act evidence, the Government introduced evidence that on September 13, 1972, appellant Mascitti was seen throwing a paper bag, later recovered by a police officer, into a trashcan (subsequent analysis showed that the materials were part of a policy operation (T.5112-5113)); and that, on several other occasions, Mascitti was seen carrying a brown paper bag (see, e.g., T.515-518, 1083, 1097-1098).

C. Evidence Pertaining to Count I

The principal evidence supporting the first substantive count was derived from a search at 957 East Second Street, Brooklyn, New York, at which a quantity of gambling materials was recovered, materials the Government claimed proved the existence of a large-scale policy operation (T.5084-5107, 5112). Defendant Voulo was found in the basement, and Scafidi was present a short time later (e.g., T.534, 1165). The Government also introduced surveillance testimony involving several defendants (see T.523-534, 741-743, 1160-1165, 1838-1844, 1871).*

*Expert testimony was also advanced by the Government in an attempt to show that designations on the materials seized from Voulo and Scafidi were similar to those seized from appellant Mascitti on September 13, 1972 (T.5228).

7

D. Evidence Relating to the Conspiracy Count

The Government's claim was that all 20 defendants were joined in the three-legged, massive numbers operation that existed over a four-year period. The evidence relating to Leg I (the Brooklyn leg), the only branch in which Mascitti was alleged to have participated, was, in essence, the evidence admitted to prove Counts I and II, and some of the evidence admitted via the Hiway Lounge interceptions (T.5588-5599). That evidence, while not inconsiderable, was but a portion of the total amount of evidence produced by the Government in this six-week trial, for the Government also offered massive amounts of evidence to prove Leg II and Leg III of its conspiracy.

Thus, to prove the existence of Leg II (the Westchester leg) of the conspiracy, the Government offered, inter alia, the following: a seizure of gambling records from an apartment in Yonkers, New York, on June 15, 1971 (defendant Pinto's fingerprints were found on some of the materials seized) (T.208-222, 4008, 5228); seizures of gambling materials from John Garcia and Victor Gonzalez (neither named as co-defendants) (T.483, 494-498) in February 1972; and seizures from Hiram Rivera (T.2076) and Peter Guido (T.512) in March 1972. Seizures from Faustino Calderin (in the presence of co-defendant Rocco Riccardi) on February 17, 1972 (see T.1323); seizures from co-defendant Lotierzo in February 1971 (fingerprints of co-defendant Vigorito were found on the records) (T.1667-1676); and a seizure of gambling records from defendant Pirone's apartment

in the presence of co-defendant Altese on March 24, 1975 (T.1352-1380, 1462, 1909) were also introduced.

As proof of Leg III of the conspiracy (the New Jersey leg), the Government offered a number of conversations among Napoli, Sr., Cassella, and a Henry Radciewicz and others intercepted pursuant to the Hiway-I and Hiway-II authorizations (see, e.g., T.3766-3780, 4147-4211, 4804-4806), as well as surveillance evidence showing the association of the principals in the New Jersey enterprise (T.545, 7921).

Finally, in an attempt to tie together the independent pieces of evidence used to prove each of the legs, the Government called a gambling expert, FBI agent Harker. Agent Harker testified that he examined all the physical evidence seized by the Government and that he was able to separate the evidence into two groups. The first group, he testified, consisted of the Leg I seizures made on June 16, 1971; May 1, 1972; September 13, 1972; and June 21, 1974 (T.5228). He identified the Leg II seizures as belonging to a second group (T.5229-5230). Moreover, Agent Harker testified that he could not reach a conclusion based on the evidence he examined that the two groups, or "legs," were part of the same operation (T.5212-5213), stating that although there were some common denominators between Group I and Group II, no conclusion could be drawn because those factors are common to most New York numbers operations (T.5231).

E. The Court's Dismissal of the Conspiracy Charge

Following the presentation of the Government's case, extensive argument by the Government, designed to show the existence of a single conspiracy (T.5586-5633) and argument by the defense that multiple conspiracies had been proved (T.5637-5656, 5683-5690), the court rendered the following opinion:

I spent this lunch hour reviewing the argument and going over Count 4, which in the superseding indictment was Count 7. And I find that the Government claims that there are three parts to this conspiracy, one basically located in Brooklyn during the period of June 16, 1971 to June 21, 1974. And the second part, which the Government calls legs, basically, and working out of Yonkers during the period that is referred to, in December of 1969 to March 1975.

And the last leg from April 15th to May 15th, in that area, is called the Jersey part.

The Government claims that the welding force in all this conspiracy or in this conspiracy, rather, is James Napoli, Sr., who is the link.

Now, James Napoli's involvement or rather proof of his involvement first came to the attention of the authorities, as far as this case is concerned, may have had suspicions, in the bugging of the Hiway Lounge in April, 1973, and continuing thereafter for a few months.

There is some indication that he exercised control over the Brooklyn part for some period of time prior to April, 1973.

Certainly for a period of at least six months, and the fact that he loaned Mr. Altese some money might show that he exercised some authority or control over part of the Yonkers leg or part -- but the Government says the Yonkers portion goes back as

far as 1969, though the conspiracy alleged in the indictment is 1971, as the commencement.

There is no showing that Napoli, in any way, exercised any control over that part of the conspiracy.

* * *

I'll even assume what Mr. Barlow said, that there is some evidence, because he said that he's been in the business for five years, but that doesn't show that he exercised authority over the Westchester part in the manner in which the Government says he exercised control over the Brooklyn portion.

But I don't have to reach that because it's clear that the Jersey leg or part, at least clear to me, that it is here improperly.

I find a difference in the role that the Government shows as exercise by Mr. Napoli.

More importantly, I find a difference in the purpose of the New Jersey portion.

The New Jersey portion of the conspiracy is alleged to be based on violation of New Jersey law and the operations that are based in New Jersey.

The mere fact that it constitutes a violation of New York law to talk about or conspire about operating policy in New Jersey does not change the object of this conspiracy.

The object of this conspiracy [as] shown was to operate a New Jersey branch, based on a New Jersey violation. It's a different statu[t]e, the personnel is different.

Mr. Napoli's role is different and I find that at least two conspiracies are alleged, maybe three. But that the New Jersey leg was actually a different conspiracy.

For that reason, I dismiss Count Four, Count Seven, in the indictment.

(T.5711-5714).*

*For disposition of the other charges, see pages 6-7, supra.

ARGUMENT

Point I

THE NUMEROUS BREAKINGS AND ENTRIES INTO APARTMENT 309 AND THE HIWAY LOUNGE WITHOUT ANY JUDICIAL AUTHORIZATION WERE ILLEGAL AND MANDATE SUPPRESSION OF ALL CONVERSATIONS SEIZED.

At no point in its successful applications for electronic eavesdropping orders did the Government request authorization to break and enter Apartment 309 or the Hiway Lounge.* The applications are devoid of any showing that a technique as dangerous as breaking and entering was required or appropriate, nor did the Government seek authorization or even consult a judge when it decided to break in additional times to move its surveillance equipment. Indeed, the applications do not even aver that the conversations were to be intercepted by a device to be placed inside the apartment or the lounge rather than by another means of surveillance. In sum, the Government, then as now, took the position that the mere issuance of a surveillance warrant authorizing the interception of oral communications invested the FBI with the unreviewable and unlimited discretion to choose to use a device which had to be placed inside the

*The single exception, of course, was Judge Judd's order permitting covert entry at the Hiway Lounge on May 2, 1973, during the period between the Hiway-I and Hiway-II orders.

apartment and business premises, and then to break and enter the premises to install, move, or repair the devices as many times and in any manner the agents wished, all without prior judicial review.*

This case is a testament to the mischief resulting from the total lack of judicial supervision of the FBI, for the record reveals that the agents broke and entered eight or more times. Thus, following receipt of the 309-I order, the agents entered the apartment in secret by means of a passkey, presumably obtained from the building superintendent (H.326). Evidently unhappy with their choice of location for the electronic device, the agents entered a second time to move the equipment and a third time to remove the bugs (H.332). No judicial officer was ever apprised in advance of the entries. The attitude of the FBI was so casual, in fact, that no one seemed to be certain of the precise number of entries that had occurred (H.332).

An even greater number of entries took place during the Hiway Lounge surveillance, a fact totally and inexorably ignored by Judge Mishler in his opinion. Entry to the lounge was first accomplished at night by means of a passkey. While the Assistant U.S. Attorney asserted at the suppression hearing -- three years later -- that the issuing judge was informally made aware of the

*Indeed, the only request even arguably relevant to entry was a request in the 309-I application for telephone company assistance in executing the 309 order. Significantly, the 309-I order does not include any assistance provision.

of the Government's intention to break and enter, there was no formal record preserved to show that such advice was actually given, no written request was made, no testimony was taken before Judge Bartels, and no formal order was issued (H.498-500). A second covert entry -- to move one of the microphones -- then occurred during the pendency of the Hiway-I order, totally without judicial knowledge or approval (H.71). Following expiration of the Hiway-I order, the agents made the one entry authorized by court order -- Judge Judd's May 2 order.* The Government admitted a later covert entry, without any judicial approval, during the Hiway-II order (H.71-72).** The unauthorized and capricious conduct disclosed by this record is totally incompatible with the Fourth Amendment and with the careful limits on electronic surveillance contained in Title III. We submit that there is no statutory or constitutional authority for the break-ins disclosed by this case. Moreover, irrespective of whether there is such authority, it is fundamental that the Fourth Amendment requires express judicial authorization before the police may conduct this sort of covert entries into a private apartment or business premises for the purpose of installing listening devices.

*We submit, in Point C, infra, that Judge Judd's order, approved without a sworn affidavit, was illegal under Title III and the Fourth Amendment.

**The record does not conclusively show whether the Government broke and entered yet again to remove the bugs.

A. There is no authority in Title III permitting the FBI to break and enter to install listening devices.

In no portion of Title III are the police explicitly given authority to break and enter to install listening devices. The Act also contains no provision empowering a court to order such a break-in to install the devices.* Nor are the federal courts empowered in any other act to order such activity. The result, we submit, is that absent Congressional revision of Title III, covert breaking and entering to install listening devices is impermissible.

Title III was a narrowly-framed statute designed to comply with the constitutional requirements of Katz v. United States, 389 U.S. 347 (1967), and Berger v. New York, 388 U.S. 41 (1967). S. Rep. No. 1097, 2 U.S. Code Cong. & Admin. News, 2112, 2163 (1968). The Act's essential purpose was to combine a limited and carefully articulated grant of power to intercept conversations, along with an elaborate set of safeguards designed to deter abuse. The Act has been strictly construed, so as to limit Government activity to that conduct expressly included in the statute, Application of the United States, 427 F.2d 639 (9th Cir. 1970); see United States v. Gigante, 538 F.2d 502 (2d Cir. 1976). "It is thus important to keep in mind not only

*This is in contrast to state statutes, a number of which provide specifically for a court order authorizing secret entry by agents to install listening devices if such entry is necessary to execute the warrant. See, e.g., N.Y.C.P.L. §700.30.

the powers that Congress was willing to grant, but also those it refused to make available despite the needs of law enforcement." In re Evans, 452 F.2d 1239, 1243 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

The only provision involving entry in Title III was contained in an amendment to the Act, added to §2518(4), which authorizes a court to order the telephone company or persons lawfully in control of premises to cooperate in the installation of such devices.* Examination of the history of that provision, which does not include any authorization to order breaking and entry by the Government, supports the position that the statute must specifically authorize break-ins as a method of dealing with electronic devices. The amendment was a response to Application of the United States, supra, 427 F.2d 639, in which the Ninth Circuit had held that the Act neither impliedly nor expressly authorized the court to direct the telephone company to assist in a wiretap. See Application of the United

*The section provides:

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

States in Matter of Order Authorizing Use of a Pen Register,
538 F.2d 956, 960-961 (2d Cir. 1976), cert. granted, 45 U.S.L.W.
3499 (January 25, 1977).

In refusing to issue an order, the Ninth Circuit analyzed the legislative history of the Act and rejected the notion that the Act gave implicit authority to order the cooperation of the telephone company:

The Government acknowledges that Title III of the Act contains no specific provision conferring such a power. It argues, however, that this is not dispositive. The power to compel the cooperation of the telephone company, the Government urges, must be the concomitant of the power to authorize the interception, for without the former the latter is worthless.

427 F.2d at 642.

The court continued:

The Government's entire case rests upon what it believes may be implied from the Act, and upon other general principles summarized above.

Title III of the Act is rather extensive, containing ten sections, some quite lengthy. It purports to constitute a comprehensive legislative treatment of the entire problem of wiretapping and electronic surveillance, complete with extensive and introductory Congressional findings. The provisions contained in Title III state, in precise terms, what wiretappings and electronic surveillance is prohibited, and what is permissible. As to the latter, meticulous provision is made with respect to the necessity and manner of obtaining prior or subsequent judicial approval....

In view of the breadth and apparent self-sufficiency of this general statute, and the total absence of any provision even hinting that the court is to have authority to enter such a unique order as the Government here seeks, we think the existence of such authority is not lightly to be implied from the Act.

427 F.2d at 643.

The court found no provision which pointed in the direction of such authority, and stated that if Title III was to be constitutional, it must be narrowly construed, and not given an expansive reading so as to imply existence of an important judicial power not expressly provided. The court stated that Congress was abundantly aware of the difficulties in installing electronic devices, but made no effort to require the help for which the Government argued. Noting that the statute attempted to define "with utmost particularity" the circumstances and conditions under which interception could be effected, the court held:

We must conclude that the omission was purposeful, or at least that it remains unexplained on any basis which would warrant recognition of such power by implication.

427 F.2d at 644.

The court concluded:

If the Government must have the right to compel regulated communications carriers or others to provide such assistance, it should address its pleas to Congress.

Id.

Two months later the 1970 amendment was adopted.

We submit that the instant situation is analogous. Like the "need" for assistance, the "need" for covert emplacement was not lost on Congress. See S. Rep. No. 90-1079, 90th Cong., 2d Sess. 103 (1968); 114 Cong. Rec. 11598, 12989, 14481 (1968). Like the assistance provision, this important judicial power was not included in Title III. Like the assistance provision,

if the Government needs this provision, Congress should provide for it. Indeed, a contrary reading of the statute would render it overbroad and unconstitutional. See Application of the United States, supra; Berger v. New York, supra.

This narrow construction of the statute was likewise adopted by this Court in Application of the United States in the Matter of an Order Authorizing Use of a Pen Register, supra, 538 F.2d at 960-961, where the court rejected a Government's assistance request under the all writs act (28 U.S.C. §1651) (since the application was for a pen register, Title III was held not expressly applicable). In analyzing the Government's claim that the court had "inherent power" to authorize such an order, this Court stated that the 1970 amendment

... was due to a doubt that the court possessed inherent power to issue such orders, or that courts would be willing to find or exercise such power, and that in the absence of specific Congressional action, other courts would similarly reject applications by the Government for compelled compliance.

538 F.2d at 962.

We submit that if there is no "inherent power" to issue an order of assistance, there is none to authorize the equally or more intrusive governmental breaking and entering. And, as we argue in Point B, absent such express authorization, no breaking and entering can occur.

Nor can such power be implied from the 1970 amendment. Congress was aware of problems in installing electronic surveillance devices, yet, unlike New York State, it included no express

provision empowering a court to authorize governmental breaking and entering.

B. Express judicial authorization is required for the covert installation, moving, or repair of electronic listening devices placed in a person's home or business.

The court below held:

It is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment.

(Mem. Op. at 52).

We respectfully submit that the conclusion of the district judge in this case -- explicitly or implicitly rejected by every reported decision that has considered this issue -- is totally at odds with the meaning and purpose of the Fourth Amendment and Title III, and invests prosecutorial agents with intolerably broad discretion.

Because of the unique dangers of electronic eavesdropping, such surveillance must be limited by strict constitutional standards. Berger v. New York, *supra*, 388 U.S. at 56; Katz v. United States, *supra*, 389 U.S. 347; United States v. Giordano, 469 F.2d 522, 530 (4th Cir. 1972), affirmed, 416 U.S. 505 (1974).

All forms of electronic surveillance -- regardless of the type of device used -- involve serious intrusions upon a person's privacy. However, there are significant differences in the extent

to which the installation of various forms of eavesdropping devices can affect individual privacy. Thus, wiretapping, the most universal form of electronic surveillance, can normally be installed without entry into a person's apartment. Furthermore, oral communications can be intercepted by the use of parabolic microphones without any entry into an individual's premises to install them. See Berger v. New York, supra, 388 U.S. at 46-47, 51. Moreover, bugging may be accomplished by placing the device on an exterior wall. Katz v. United States, supra. However, some bugging cases involve an additional and extraordinary invasion of privacy over and above the interception of conversation. If agents choose to use a device designed to be placed inside an individual's home or business, the agents' physical entry into a person's premises may be necessary for installation. Moreover, since all forms of eavesdropping can be effective only if obtained without the subject's consent, the state's entry must be covert as well. The installation of a bug in this manner thus affords the agents of the state unrestrained access to every corner of an individual's premises while searching for a location to place the bug.

While the interception of oral communication affects an individual's expectation of being free from having his conversations intercepted, a surreptitious entry affects his freedom from actual and covert physical trespass. This separate interest is clearly protected by the Fourth Amendment. United States v. Hufferd, 539 F.2d 32 (9th Cir. 1976) ("beepers" placed

inside drum and truck: beeper inside drum does not require warrant; for intrusion in truck, warrant is required); see Warden v. Hayden, 387 U.S. 294, 301 (1967) (Fourth Amendment designed to protect "the sanctity of a man's home and the privacies of life"); Jones v. United States, 357 U.S. 493 (1958); Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. en banc 1970)

("Freedom from intrusion into the house or dwelling is the archetype of the privacy protection secured by the Fourth Amendment"); see also Sabbath v. United States, 391 U.S. 585 (1968); Miller v. United States, 357 U.S. 301 (1958).

Because breaking and entering is both a serious and extraordinary intrusion, it is fundamental that before it can be permitted, "the deliberate and impartial judgment of a judicial officer ... be interposed between the citizen and the police."

Katz v. United States, supra, 389 U.S. at 357; cf. United States v. United States District Court, 407 U.S. 297, 316-317 (1973).

Moreover, since each entry is an independent intrusion upon privacy, each entry must be separately approved. Osborn v. United States, 385 U.S. 323, 328-330 and n.6 (1966), and since oral communications can often be intercepted without covert entry, such an invasion must be strictly limited to situations where the governmental interest in such entry is compelling. Cf. United States v. Ford, 414 F.Supp. 879 (D.D.C. 1976) (Gessell, J.), appeal pending, D.C. Cir. Doc. Nos. 76-1467, 76-1501, 76-1502, 76-1503; see sealed affidavit filed with this Court accompanying appellant Mascitti's brief.

While only two reported cases have discussed this question, both support appellant's position. Thus, in United States v. Ford, supra, the police requested an order authorizing the bugging of a shoe store; before deciding that some sort of entry into the premises to place the device would be attempted, the Assistant U.S. Attorney determined that less intrusive means of surveillance not involving physical entry (parabolic microphone or spike mike) were not practicable; moreover, because of scruples -- not present here -- concerning the "Watergate" overtones of breaking and entering, the police decided to plant the bug by a bomb scare ruse. This decision was orally presented to the judge, who approved but left the final determination of the method of entry to the police. The judge then issued a surveillance order that included the following provision: "Entry and re-entry may be accomplished, including, but not limited to, breaking and entry or other surreptitious entry, or entry and re-entry by ruse and stratagem." After the first installation of the bugs by stratagem proved ineffective, the Assistant U.S. Attorney returned to the district judge and informed him of his intention of re-entering. After again securing informal approval, the police entered a second time.

Judge Gessell found that the police action in installing the bugs was reasonable and that the court monitored progress of the surveillance. However, the court nevertheless held that the initial authorization, which permitted the more intrusive means of entry by breaking as well as by ruse, and which permit-

ted re-entry without any specific court approval, was overbroad, and that suppression was therefore required:

A warrant must be specific. It is not a general hunting licence. Where more than one entry is involved such intrusion must be treated formally and approved in advance so that the judge or magistrate can supervise when and how entry is to be accomplished. A separate determination of probable cause and reasonableness is required as to each intrusion upon private premises. The authorization given in this instance did not limit the number of entries nor did it specify either the general time or manner of entry. Thus, the authority given was far too sweeping.

Id. at 884. Citations omitted, emphasis added.

Of course, the instant case is a far more compelling one for suppression than Ford. While in Ford no actual break-in occurred, here there were several; in Ford, a specific, although overbroad, order was secured; here, no order at all was sought;* in Ford, the court actually monitored the entries; here, with the exception of the first entry into the Hiway Lounge, no judicial authority was made aware, even informally, of the unauthorized entries.

The only other reported case bearing on this issue is the recent Eighth Circuit opinion in United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976). In that case, the district court expressly authorized a covert entry, and the bug was placed in the defendant's business premises. On appeal, Agrusa claimed that the district court could not, "consistent with the Fourth

*The exception, of course, was Judge Judd's May 2 order.

Amendment and other applicable law," authorize the intrusion.

The majority disagreed, but qualified its holding as follows:

[L]aw enforcement officers may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of entry to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based upon probable cause and otherwise in compliance with Title III. We express no view on the result which obtains when one or more of these factual variants is altered.

541 F.2d at 701.

In a stinging dissent, Judge Lay asserted that clandestine breaking and entering could not be undertaken consistent with the Fourth Amendment. On rehearing, the Eighth Circuit divided evenly (4-4), denying rehearing. Judges Lay, Heaney, Bright, and Henley dissented from the denial of rehearing because "we believe that the Fourth Amendment does not permit Government agents to break into and enter a private premises to spy out evidence which might develop in the future by planting an electronic bug on such premises." Thus, while the authority to break and enter has been subject to sharp conflict, there has been no conflict, prior to Judge Mishler's opinion, that such activity must, at the very least, be undertaken pursuant to specific court authorization.

In his opinion denying suppression, Judge Mishler also claimed that the entries in this case were acceptable because they were, in fact, monitored by Judge Bartels. That conclusion

is incorrect, both legally and factually.

At the suppression hearing, the Assistant U.S. Attorney proffered that Judge Bartels was informally made aware of the initial entry into the Hiway Lounge. No record of any discussion with the issuing judge was made, and no affidavit specifically requesting authority to break and enter was presented. Thus, there is no formal record to support the allegation made by the Assistant U.S. Attorney to Judge Mishler more than three years after the orders were approved. Even if the Assistant U.S. Attorney were correct in his appraisal of the circumstances underlying the first entry, permitting such an unrecorded application and authorization to satisfy the requirements of a warrant would be totally at odds with the Fourth Amendment, which provides that:

[t]he right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures, shall not be violated, but upon probable cause, supported by an Oath or Affirmation, and particularly describing the place to be searched and the persons to be seized.

Moreover, the unrecorded application is totally inconsistent with congressional intent as to the proper procedures to be followed in securing a wiretap warrant. Thus, as Congress noted, under 18 U.S.C. §2518(2), if the judge desires additional testimony to support the orders, the applicant should furnish such evidence under oath and affirmation or with the use of a court reporter. See S. Rep. No. 90-1097, 90th Cong., 2d Sess., 102 (1968). In short, the Assistant U.S. Attorney's post hoc asser-

tions at the suppression hearing are not sufficient.

Moreover, factually the record belies Judge Mishler's conclusion that the break-ins in this case were monitored. First, as even the Assistant U.S. Attorney conceded, none of the 309 break-ins had any judicial approval. Moreover, the subsequent entries into the Hiway Lounge, which were freely admitted by the Government, were undertaken without informing any judicial authority. In fact, in only one of the entries that occurred without court order -- the first entry into the Hiway Lounge -- was any impartial authority informed in advance of the Government's plans (H.498-501).

Further, the failure to request judicial approval in this case was extremely prejudicial, for such approval, if sought, should not have been granted, because the Government failed to make a showing of "paramount need" for such authority. Traditionally, searches and seizures that result in entries of private premises may take place only when both probable cause exists and when the target individuals are confronted and learn immediately what is taking place. Such occurrences are to be contrasted with surreptitious entries into houses or offices for the purpose of installing a bug and then of monitoring the same thereafter for a period of time while the target individuals have no knowledge of the existence of the bug (see sealed affidavit). Because of the intrusion caused by bugging and surreptitious entry, they should be permitted, if at all, only upon a showing by the Government of absolutely "paramount" need.

The Government made no effort to show such need here, nor could it. First, in the 309 orders, the Government never even showed that the same information could not be obtained by means of wiretaps or that other forms of surveillance were not possible; with respect to the Hiway Lounge, there was no proffer that a parabolic microphone could not be used or that the bugs could not be placed by the informers who frequented the lounge. In any event, even if the Government could have shown that failure to permit surreptitious entry would have ended the investigation, that showing would have been insufficient to establish a "paramount" need for this activity. We submit that the proper standard for this application was enunciated by Judge Lay in his dissent in United States v. Agrusa, supra:

Even if no other practical means of surveillance existed, however, a grant of authority for forcible entry of private premises with the speculative hope of obtaining some future conversation concerning criminal activity would still not be justified. The Government's interest in law enforcement does not outweigh the citizen's justifiable expectation that government authorities will not, under the cloak of authority, surreptitiously break into his home or office. I would hope there still exists "a private enclave where [a person] may lead a private life" without fear of stealthy encroachment by government officials. This sanctity must give way only when the government's interest is paramount. When we weigh such interests, we should do so most carefully.

541 F.2d at 703.*

*We are aware, of course, that the majority in United States v. Agrusa, supra, reached a different conclusion -- a conclusion that has evenly divided the Eighth Circuit. See 541 F.2d at 704. We respectfully submit that the case was wrongly decided and note

(See sealed affidavit.)

In sum, in the absence of truly compelling circumstances, no order authorizing the extreme measure of breaking and entering should be approved. Here, of course, no order was even sought. Therefore, the result must be suppression of the 309 and Hiway Lounge communications.

C. Judge Judd's May 2 order to permit breaking and entering the Hiway Lounge was in violation of the affidavit requirement of the Fourth Amendment.

Appellant hereby adopts the argument advanced by appellant Napoli Sr. that Judge Judd's order of May 2, 1973, taken on oral presentation without supporting affidavits, was a violation of the warrant requirement of the Fourth Amendment.

D. Appellant Mascitti has standing to contest the illegal entries into Apartment 309 and the Hiway Lounge.

Under the standing provision of Title III, 18 U.S.C. §2510 (11), an "aggrieved person" is defined as one

[Footnote continued from the preceding page]

that one of the underpinnings of the majority's conclusion -- the fact that the break-in occurred at a business premises, supposedly entitled to less constitutional protection than a home -- has already been removed by the Supreme Court. See G.M. Leasing Corp. v. United States, 20 Cr.L.Rep. 3035 (Sup. Ct., January 12, 1977).

... who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Here, appellant Mascitti was clearly an "aggrieved person" under the statute and constitutional law. His conversations were repeatedly seized during the 309 surveillance, and evidence of an intercepted conversation at the Hiway Lounge in which he allegedly participated was also admitted.

Under 18 U.S.C. §2518(10), any "aggrieved person" may move to suppress if

(ii) the order of authorization or approval under which it was intercepted was insufficient on its face.

If, as the Government conceded, surreptitious entry was the contemplated means of installing the bug, the failure to secure a specific authorization results in a warrant deficient on its face for such surveillance. Accordingly, Mascitti, whose conversations were intercepted, has standing to contest the entries at both Apartment 309 and the Hiway Lounge.

Again, United States v. Ford, supra, is on point. There, several different defendants, a number of whom claimed standing only because their conversations were seized, moved to suppress on the ground that the authorization for surreptitious entry was overbroad. The court, rather than confining its decision solely to those individuals with an interest in the premises, granted suppression under the wiretap statute to all defendants, since all were aggrieved by having had their conversations seized.

The statutory standing rule is no different from that re-

quired by the Supreme Court for constitutional purposes in Alderman v. United States, 394 U.S. 165, 176 (1969). There, the Court held:

[A]ny petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations.

In denying appellant standing to contest the entries, the court ignored Alderman and the wiretap statute, and held that standing to contest the entries accrued only to those having a possessory interest in the premises or those present at the time of the entry. The court then decided that appellant could meet neither of these criteria. Implicit in this view is the unarticulated assumption that standing to contest the entries was somehow different from standing to contest the interceptions. We submit that the court's reasoning is flawed for a number of reasons.

First, if, as we contend, express judicial authority is required for the entry, and if no authorization appears, it is clear that the warrant is deficient on its face, and any "aggrieved person" may challenge it. United States v. Ford, supra. Thus, the court's decision depends first on the validity of its ultimate decision on the merits -- that no express authorization is necessary.

Second, even if no judicial authorization were necessary,

the distinction drawn by Judge Mishler between standing to contest a search and standing to contest the illegal entry -- which is an essential of the search -- would be utterly incorrect. This Court has never accepted a distinction between standing to contest entry and standing to contest a search, nor should it, since "a lawful entry is the indispensable predicate of a reasonable search." Ker v. California, 374 U.S. 23, 53 (1963) (Brennan, J., concurring and dissenting); Gouled v. United States, 255 U.S. 298, 305-306 (1921). For example, in United States v. Mapp, 476 F.2d 67 (2d Cir. 1973), this Court determined the validity of a warrantless search in the apartment of defendant Mapp's girlfriend. The court sua sponte found that Mapp's possession of the heroin gave him standing to contest the seizure of the heroin, allegedly in violation of his Fourth Amendment right. However, also included in Mapp's claims was a challenge to the forcible entry of the apartment. 476 F.2d at 74-75. Apparently, Mapp had no possessory interest in the premises, nor was he present during the entry. Nevertheless, this Court assumed Mapp's standing to challenge the search also invested him with standing to challenge the entry. Thus, Judge Mishler's artificial distinction between entry and search must be rejected.

Moreover, even assuming, arguendo, the validity of Judge Mishler's bifurcated standing test, appellant Mascitti has standing to contest the entries.

One of the grounds cited by Judge Mishler which confers

standing is the defendant's presence at the time of the search. While appellant was not technically present during the installation, it must be remembered that an electronic surveillance is a continuing search. Thus, even if not present during the installation, those defendants intercepted were, in fact, present during the search, and thus have standing to contest the entries. See Jones v. United States, 362 U.S. 257 (1960).*

Furthermore, it is clear that, with respect to Apartment 309, appellant Mascitti had a sufficient possessory interest in the apartment to contest the entries. The court found that he paid Ms. Engert, the lessee, for the right to use the private apartment, and that appellant Mascitti was provided with a key. Having paid for use of the apartment, and having continually used it during the afternoon, Mascitti clearly had a reasonable expectation of privacy, and could reasonably have assumed that the premises would be used only by himself or Ms. Engert and her invitees.

The court's conclusion from these facts that appellant possessed only "a license to use the premises during the daytime," but no right to object to entry during the night (when the break-in presumably occurred) (see Mem. Op. at 48), is both incorrect and irrelevant. It is incorrect, for the record shows that the entry into Apartment 309 occurred during the daytime, not at

*Any other interpretation of the "presence" requirement with respect to this electronic surveillance would be utterly Kafkaesque, since the entry was deliberately scheduled to occur when no one would be present.

night (T.72-73). More important, it is irrelevant, because the issue is not whether Mascitti had a 24-hour possessory interest in the apartment, but whether the possessory interest he did have gave him a reasonable expectation of privacy.

Generally, a defendant satisfies the standing requirement if he has an adequate possessory interest in the place ... searched to give rise to a reasonable expectation of privacy....
[A] reasonable expectation of privacy in the enjoyment of a place may attach where there is little or no proprietary interest.

United States v. Hunt, 505 F.2d 931, 938 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975).

Indeed, in cases where defendants showed a far weaker possessory interest than the instant case, standing has been accorded. Thus, in United States v. Miguel, 340 F.2d 812, 841 n.2 (2d Cir.), cert. denied, 382 U.S. 859 (1965), the defendant objected to the manner of entry into an apartment owned by a Miss Lewis. Although Miguel had no possessory interest, he was permitted to stay in the apartment from "time to time" and to keep his clothes there. This interest was held by this Court to be sufficient to give Miguel standing to contest the entry to the apartment. See also United States v. Burke, 506 F.2d 1165 (9th Cir. 1974), cert. denied, 421 U.S. 925 (1975) (van owned by defendant's brother-in-law frequently used by defendant); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (search of field owned by defendant's father-in-law on farm frequently used by defendant); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963) (defendant lived at apartment with owner's consent).

2

Baker v. United States, 401 F.2d 958, 983-984 (D.C. Cir. 1968), is almost directly on point. There, the defendant had a key to a hotel suite of one Black and was permitted to use the suite. The court held that conversations intercepted at the suite should be suppressed, even as to those where the appellant was neither present nor overheard, since

[a]ppellant's interest in the Black suite warranted his expectation of freedom from governmental intrusion, and any "bugging" of those premises was a violation of his privacy.

... [A]ppellant's relationship to and interest in the Black premises made those premises, as to him, a constitutionally protected area.... This was sufficient to confer on him standing to suppress any evidence garnered through electronic surveillance of the Black suite, whether or not he was a participant in, or present at, particular overheard conversations.

Accord, Alderman v. United States, *supra*; Mancusi v. DeForte, 392 U.S. 364 (1968). Thus, even if standing is afforded only to individuals with a possessory interest in the premises, Mascitti has standing to contest the entries into Apartment 309.*

*Finally, we note that appellant Mascitti has standing to contest the entries into Apartment 309 because he was clearly the person against whom the entries were directed -- a fact utterly beyond dispute here. See Jones v. United States, 302 U.S. 257, 261 (1960).

Point II

THE INITIAL APPLICATION TO INTERCEPT
ORAL COMMUNICATIONS AT APARTMENT 309
FAILED TO ESTABLISH PROBABLE CAUSE
THAT APARTMENT 309 WAS BEING USED IN
CONNECTION WITH A VIOLATION OF TITLE
18 U.S.C. §1955.

Before a surveillance order under Title III may issue, the Government must show probable cause that the place at which the monitoring is to occur is the situs of illegal activity, i.e. that "there is probable cause for belief that the facilities from which, or the place where, the wire and oral communications are to be intercepted are being used, or are about to be used, in connection with commission of such offense, or are leased to, held in the name of, or commonly used by such person." 18 U.S.C. §2518(3)(d).

Here, the evidence upon which the court below relied to show the connection between Apartment 309 at 8-15 27th Street in Queens and a gambling offense consisted of the following: (1) that on September 13, 1972, appellant Mascitti was seen discarding a brown paper bag in a trashcan in Brooklyn. Retrieved by FBI agents, the bag was shown to contain policy material; (2) Mascitti was seen in Brooklyn, Manhattan, or Queens on eight different occasions carrying brown paper bags similar to the one discarded on September 13; (3) that Mascitti was often seen conversing with "known gamblers," including one Joseph Mustacchio, who had admitted his continuing association

in policy activity; (4) that on approximately four occasions in the late afternoon Mascitti was seen entering or in the vicinity of 8-15 27th Avenue, a highrise apartment building containing more than 100 apartments; (5) that the time he was seen entering and leaving the building was consistent with that of a "bank worker" in a numbers operation; and (6) that on November 14, 1972, he was seen entering Apartment 309 with a key, at which time he allegedly told the building superintendent that he was on his way to visit his girlfriend* (Mem. Op. at 8-10; see affidavit of Charles Parsons, ¶¶35, 28-33). We submit that the above evidence was utterly insufficient to establish probable cause that Apartment 309 was being used by Mascitti or anyone else as a situs for violation of 18 U.S.C. §1955.

The record shows that Apartment 309 was leased not to appellant Mascitti or any known gambler, but to Phyllis Engert, a single woman. The affidavits contained not a hint of evidence to justify a conclusion that Ms. Engert was involved in gambling activity. Moreover, Mascitti's connection to the apartment was limited to a single occasion -- November 14, 1972 -- when the building superintendent saw him entering the apartment with a key. That single entry is totally insufficient to

*The affidavit is ambiguous concerning whether Mascitti was seen entering on November 14 or whether he told an informer on November 14 that he was going to enter Apartment 309, and, in addition, that he was entering the apartment on November 20, 1972. At the suppression hearing, Parsons resolved the ambiguity by stating that Mascitti had only been seen entering the apartment on one occasion -- November 14 (H.257-258) -- by the building superintendent.

show that the premises was "commonly used" by Mascitti, let alone that it was used for gambling. See 18 U.S.C. §2513(3)(d). Nor is the Government's argument that Mascitti commonly used the premises aided by the fact that he was seen around the building on four occasions when it is remembered that the building is a highrise apartment building containing more than 100 apartments (H.399).

Furthermore, even if this evidence were probative of Mascitti's presence at Apartment 309 on four or five occasions, it would still be insufficient to establish probable cause, for the simple reason that the record is utterly devoid of evidence indicating that the apartment was being used for illegal activity. First, no other "known gamblers" were specifically seen entering Apartment 309; moreover, there was not a single observation even that Mascitti carried a brown paper bag, the supposed trade mark of a policy worker, into 8-15 27th Street, let alone into Apartment 309. There was no physical evidence seized, nor any informer's testimony, reliable or unreliable, to show that a policy bank was functioning in the apartment. Instead, the affidavits merely allege that a "known gambling worker" entered the premises, at a time consistent with that of a policy worker. Such a showing is a totally insufficient basis for a finding of probable cause. See Spinelli v. United States, 393 U.S. 410, 414 (1969); People v. Fino, 14 N.Y.2d 160, 163 (1964). United States v. Maniello, 345 F.Supp. 863 (E.D.N.Y. 1972), cited by Judge Mishler as analogous to this case, is not only

distinguishable, but by contrast, outlines the weakness of the probable cause showing in this case. The affidavits in Maniello outlined the following physical surveillance:

[M]any exchanges of envelopes in or near the subject premises among the defendants and other persons, a minimum of 15 people per day double or triple parking in front of the premises and entering and remaining therein for two to five minutes, each of the named defendants closing the premises on various days at 3:30 p.m., [one] defendant leaving the premises with a brown paper bag, no merchandise visible at the premises, and no activity consistent with the operation of a legitimate enterprise.

345 F.Supp. at 869-870.
Emphasis added.

Not a single feature of those observations is duplicated here. There were no brown paper bags seen in Mascitti's presence at 8-15 27th Avenue; there was no triple-parking; and most important, Mascitti's activity was perfectly consistent with that of an innocent man.

Moreover, in Maniello, unlike the instant case, informants' tips indicated that "incriminating conversations could be intercepted at the subject premises." Id. at 870. Here, while there were informants' tips indicating that appellant Mascitti's associates were involved in gambling, there was none that Apartment 309 was used for that purpose. In the end, the only "evidence" of Mascitti's illegal activity at Apartment 309 was Agent Parsons' assertion

that the activities and conduct of ... Rosetti, and of John Doe "C", also known as Barry Russo [appellant Mascitti], are

entirely consistent with the operation of
a policy "bank" or office.[*]

That statement is mere conjecture, and must be rejected.**

Thus, suppression must be had on the 309-I order; moreover, since the probable cause showing for 309-II and 309-III was based almost exclusively on the conversations intercepted pursuant to 309-I, those conversations too must be suppressed. United States v. Wac, 498 F.2d 1227, 1232 (6th Cir. 1974).

*Rosetti, Mascitti's alleged co-worker, was never even seen entering Apartment 309.

**We note another defect in the applications: The single observation of Mascitti in Apartment 309 occurred on November 14, 1972 -- 24 days before the swearing of the affidavit, and even the observations of Mascitti near 8-15 27th Avenue closest in time to the date of the affidavit occurred on November 20, 1972, more than two weeks prior to the swearing of the affidavit. Yet Agent Parsons alleged in the affidavit that the location of policy "banks" -- the alleged activity being conducted here -- was moved "frequently," approximately "once a month." (See Parsons affidavit, p.2, ¶11). Thus, the allegations are stale. See Sgro v. United States, 287 U.S. 206 (1932); United States v. Neal, 500 F.2d 305, 309 (10th Cir. 1974); Durham v. United States, 405 F.2d 190 (9th Cir. 1968), vacated on other grounds, 401 U.S. 481 (1970).

Point III

THE UNREASONABLE AND UNEXPLAINED
DELAYS IN THE SEALING OF THE 309
TAPES MANDATE SUPPRESSION OF ALL
CONVERSATIONS SEIZED.

Title 18 U.S.C. §2518(8) (a) provides, in pertinent part:

... Immediately upon the expiration of the period of the order, or executions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions....

... The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use of disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of Section 2517.

(Emphasis added.)

This provision is far more than a technicality. "The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of [Title III]," and is to be strictly construed. United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976); United States v. Ricco, 421 F.Supp. 401 (S.D.N.Y. 1976). Here, the Government's failure to adhere to the sealing requirement mandates suppression of all conversations intercepted at Apartment 309.

The record shows the following delays in sealing:

<u>Order</u>	<u>Expired</u>	<u>Sealing</u>	<u>Delay</u>
309-I	12/23/72	1/16/73	24 days
309-II	2/ 1/73	2/ 5/73	4 days
309-III	3/ 9/73	3/16/73	7 days

The sealing of the Apartment 309 tapes -- from 4 to 22 days tardy -- was clearly not "immediate." That term was defined most recently by Judge Lasker in United States v. Ricco, supra, 421 F.Supp. at 410, to require

... that law enforcement officers must be provided reasonable resources which must be used with reasonable dispatch to the end that the tapes are sealed as soon after the taps end as is possible in such circumstances.

Here, there was simply no question that the Assistant U.S. Attorney in fact had the ability to present the tapes for sealing on the date the order expired, or at least on the following day (see H.461-471). Nevertheless, the Government waited, in one case more than three weeks, to present the tapes for sealing.*

Not only were the tapes not sealed immediately, but no "satisfactory explanation" was tendered for these delays. The Government admitted that the delays in sealing the 309-I and 309-II tapes were a result of a decision not to seal the tapes until a subsequent order was approved (H.463-467); the delay in sealing the 309-III tapes was due simply to the fact that the Assistant U.S. Attorney in charge of the investigation was preparing for another trial (H.468). Accordingly, since the seal-

*Even with respect to the more modest delay in the 309-II order -- four days -- the sealing was not immediate. The Government alleged that monitoring ceased on January 31, 1973 -- a Wednesday -- and the order expired the following day. Nevertheless, the Government failed to take the tapes to be sealed on February 1 or February 2, but instead waited until the following Monday -- February 5, 1973 -- to take the tapes to be sealed (H.466-467).

ing was not immediate, and since there was no satisfactory explanation for the delay, suppression is required. United States v. Gigante, supra.

Judge Mishler's decision denying suppression was based on two conclusions: First, the district court held that the 309-II and 309-III orders were merely "extensions in fact" of the original 309-I order, and that sealing was therefore not required as to 309-I and 309-II until the expiration of 309-III. We submit that this conclusion must be rejected. First, there is nothing in the orders themselves to indicate that they were mere extension orders. There is no use of the word "extension" or "continuation" in the orders themselves. Moreover, the 309-III order included an entirely different location. Indeed, the Government itself took the position that the subsequent 309 orders were new orders rather than mere extensions:

BY MR. BORSTEIN:

Q Mr. Barlow, a few areas within the areas that we have talked about. And the first area is as to the continuing nature of the 3092 and 3093 [309-II and 309-III] -- just to clarify -- is it the Government's position that in order to get identification of a continuing wiretap or a continuing oral reception order that they put the word continuing in the order caption itself?

A Yes, sir. The extension orders are designated by the use of the word continuing.

Q So if the [309-II] and [309-III] are not so designated therefore they are not extension orders?

A That is right.

(H.542).

* * *

THE COURT: Now, you understand that -- or you argue that the extension of 309 to extend to the time of sealing the tape for [309-I]? In addition to postponing the notice of inventory? Is that what you say?

THE WITNESS: No, sir. When we submitted the papers for Apartment [309-II] and for Apartment [309-III], they were submitted as extension orders. And the language talked about continuing extension. However, that was changed in Washington after it had been in Washington for -- well, for several weeks for both of the orders. They were treated by the Department as being original orders.

THE COURT: Each one of them?

THE WITNESS: Yes, sir.

THE COURT: 301 and 309 -- I mean 309 [I, II, and III]?

THE WITNESS: Yes, sir.

(H.491-492; emphasis added.)*

Since the 309-II and III orders were not extensions, since the 309-I and II tapes were not sealed immediately, and since

*In its decision, the court below wrote:

Although the word does not explicitly appear in the text of the affidavits ... testimony indicated that the Department of Justice policy was to use the word "continues" to denote "extension." True, while the government's policy is not determinative, it is at least evidence of the intended scope of the surveillance, and due weight must be accorded it.

(Mem. Op. at 39.)

The statement, if correct, completely contradicts the court's conclusion that the 309 orders were extensions.

no excuse for the delay was tendered, suppression is mandated.*

The second prong of the district court's holding was its conclusion that the Assistant U.S. Attorney's preparation for trial sufficiently explained the seven-day delay in sealing the tapes from 309-III -- the final order -- in view of the "measures taken to preserve the tapes," since "absolutely no evidence was introduced indicating even the slightest hint of tampering" and since "the sealing one week after the expiration of the subject order was not done with intent to evade statutory requirements or gain a tactical advantage." Mem. Op. at 42. With all due respect, those conclusions, even if true, are not relevant. The position that there must be any showing of tampering with the tapes to justify suppression was explicitly rejected by this Court in United States v. Gigante, supra, 538 F.2d at 505. Nor was there any claim in Gigante that the Strike Force attorneys in that case had acted with any improper notice or with any attempt to prejudice the appellants. Accord, United States v. Ricco, supra. The issue is not good faith or bad faith, but whether the Government has complied with the statute.

*United States v. Wac, 498 F.2d 1227 (6th Cir. 1974), on which the court below relied, is simply inapposite. The issue raised in that case was not, we submit, what constitutes an extension order, but an evaluation of the fruit of the poisonous tree doctrine in the wiretap context. The court merely held that where a second order entailed similar subjects and where there was a direct connection between the results of the first order and the need for the second order, the second order, although not an extension, was the fruit of the first. The Sixth Circuit most decidedly did not hold that the second order was an extension. 498 F.2d at 1231-1232.

Thus, the relevant question is simply whether the seven-day delay for 309-III was satisfactorily explained. (As noted, no satisfactory explanation was tendered with respect to 309-I or 309-II.) It is difficult to see how ordinary trial preparation, which is after all the business of the Assistant U.S. Attorney when he is not on trial, can constitute a satisfactory explanation for the delay. This is particularly true in light of Mr. Barlow's failure to make any claim that he was too busy to make the trip "across the hall" to the district court, or that no one else in his office was so equipped. Accordingly, suppression of all the 309 tapes is mandated. United States v. Gigante, supra; United States v. Ricco, supra.

Point IV

THE GOVERNMENT'S UNEXPLAINED FAILURE TO FILE TIMELY PROGRESS REPORTS COMPELS SUPPRESSION.

The orders authorizing surveillance at Apartment 309 and at the Hiway Lounge all required that the Government file progress reports on the fifth and tenth days of each order, outlining the results of the surveillance and the need for continued monitoring. These clear and specific court orders were repeatedly and without excuse violated by the Government. Since the progress reports play a central role in Title III, suppression of all conversations seized is mandated. Cf. United States v. Giordano, 415 U.S. 505 (1974).

The record shows that the Government complied with not a single order in this case:

<u>Order</u>	<u>Report Due</u>	<u>Report Filed</u>
309-I (12/ 8/72)	12/13/72 12/18/72	12/18 (5 days late) 12/19 (1 day late)
309-II (1/15/73)	1/20/73 1/25/73	Report timely filed No report filed
309-III (2/20/73)	2/25/73 3/ 2/73	No report filed 3/16 (2 weeks late)
Hiway-I (4/12/73)	4/17/73 4/22/73	4/19 (backdated to 4/18 - 2 days late) Timely
Hiway-II (5/ 3/73)	5/ 8/73 5/13/73	Undated 5/15 (2 days late)

Section 2518(10)(a) of Title III provides for suppression of intercepted communications when "(i) the communication was unlawfully intercepted" or "(iii) the interception was not made in conformity with the order of authorization and approval."

In United States v. Giordano, supra, 416 U.S. at 527, the Supreme Court made clear that suppression under these provisions was not limited to constitutional violations, and that

Congress intended to require suppression where there is failure to satisfy any of the statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

Accord, United States v. Donovan, 45 U.S.L.W. 4115 (Sup. Ct., January 18, 1977).

We submit that, when ordered, reports play a critical role in limiting electronic surveillance, and the failure to comply with the reporting order mandates suppression. Progress reports ordered by district judges insure compliance with the constitutional requirements that the search end as soon as possible and that the intrusion be minimized. Berger v. New York, supra, 388 U.S. at 59-60.* Thus, the legislative report on Title III

*Thus, in Berger, where the Court struck down New York's wiretap statute, some of the defects noted were that the statute permitted indiscriminate monitoring and that "[t]he statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer." 388 U.S. at 59-60. The framers of Title III specifically declared that the bill was designed to mirror the constitutional requirement of Berger. S. Rep. No. 1097, 2 U.S. Code Cong. & Admin. News, 1968, at 2163.

states, with respect to progress reports:

Paragraph (b) sets out a procedure for periodic judicial supervision during a period of surveillance. It must be read in light of paragraph (1)(d) [the time limit of the order] and paragraph (5), both of which are discussed above.... The reports are intended as a check on the continuing need to conduct the surveillance. At any time the judge is convinced the need is no longer established, he may order the surveillance discontinued. Section 2518(1)(d), discussed above, will serve to insure that extended surveillance is not undertaken lightly. This provision will serve to insure that it is not unthinkingly or intentionally continued without due consideration.

S. Rep. No. 1097, 2 U.S. Code
Cong. & Admin. News, 1968, at
2192-2193.

The critical role progress reports play in insuring that minimization occurs has also been recognized:

A vital aspect of the minimization requirement -- perhaps the most vital -- is the degree of supervision over the surveillance provided by an impartial judicial officer. Close scrutiny by a federal or state judge during all phases of the intercept, from the authorization through reporting and inventory, enhances the protection of individual rights within the context of an extreme, yet essential law enforcement activity. Such scrutiny is basic to the structure and the constitutionality of the Act. United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973). The scope of surveillance is likely confined to reasonable bounds where the agents must systematically and continually explain their conduct to a judge, seek his approval for further interceptions, and conform their actions to his detailed instructions. See United States v. Cox, 462 F.2d 1293 (8th Cir. 1972). Indeed, even if the judge does not provide particularized guidelines beyond the terms of his order, the need to answer to an in-

dependent official sets the tone of the surveillance. Where the judge carefully studies the reports submitted to him, reviews all details told to him, and provides an active supervision of the interception, the rights of affected individuals are most likely to be safeguarded.

United States v. Bynum, 360 F.Supp. 400, 410 (S.D.N.Y.), affirmed, 485 F.2d 490 (2d Cir. 1973), vacated, 417 U.S. 419 (1974).

Thus, progress reports serve a critical function, not only in limiting the course of surveillance, but as a check that it is no broader than necessary. Accordingly, it must be regarded as a central feature of Title III. Since the progress report orders were persistently violated by the Government here, suppression of the Apartment 309 conversations should be ordered.*

*The Government's blatant disregard of the court orders requiring progress reports were by no means isolated examples of non-compliance with Title III. Thus, as the Assistant U.S. Attorney conceded, the Government delayed three months beyond time limits prescribed by Title III before it served notice of inventory of the Apartment 309 conversations. No excuse whatsoever was proffered for the failure even to contact a judge to request additional postponements. While this delay, in and of itself, would probably not require suppression (cf. United States v. Donovan, *supra*, 45 U.S.L.W. at 4122), a different result should obtain where the Government persistently disregards the requirements of the court order and Title III.

Point V

SUPPRESSION OF THE CONVERSATIONS
MONITORED IN APARTMENT 309 MANDATES
A REVERSAL OF THE CONVICTION AGAINST
APPELLANT ON COUNT III (THE HIWAY
LOUNGE COUNT).

In a number of the preceding points it is argued that the surveillance at Apartment 309 was conducted in violation of Title III and the Fourth Amendment. Because of the significant impact of the Apartment 309 surveillance, if such conversations are suppressed, the result must be a reversal of the judgment on Count III (the Hiway Lounge count) -- the only count on which appellant Mascitti was ultimately sentenced.

Title III provides its own suppression provision, 18 U.S.C. §2515:

Wherever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

This rule has been interpreted as a codification of the "fruit of the poisonous tree" doctrine. United States v. Wac, *supra*, 498 F.2d at 1232. Thus, for example, under this section, if a subsequent eavesdrop order is the "direct fruit" of a previous order, the subsequent order must be suppressed. Ibid.

Here, it is clear that the Hiway Lounge surveillance -- the principal direct evidence of guilt on the Hiway Lounge count -- was a direct fruit of the Apartment 309 surveillance. First, the Apartment 309 surveillance constituted the centerpiece in the showing by the Government of probable cause for the issuance of the Hiway-I order (see affidavit of Charles Parsons for Hiway-I at 5-10). Thus, it is clear that there is "a connection between the results of the first order and the need for the second" which had not "become so attenuated as to have dissipated the taint." United States v. Wac, supra, 498 F.2d at 1232. Indeed, one of the principal purposes of the surveillance at Apartment 309 was to accumulate sufficient evidence against James Napoli, Sr., the head of the enterprise, whose alleged headquarters was the Hiway Lounge (see Parsons affidavit for 309-I at 5, 28).

Moreover, a reversal must also result for the reason that the admission of the Apartment 309 evidence played a significant role in Mascitti's conviction on the Hiway Lounge count.

The significant evidence of Mascitti's guilt on the Hiway Lounge tapes was sparse indeed: Mascitti's alleged conversation on the single date of May 11, 1973. Compare, however, the evidence against Mascitti on the Apartment 309 counts: the jury was regaled, day after day, for well over a week, with tapes of conversations monitored on dozens of dates allegedly containing Mascitti's voice. Not only did the tapes show, according to the Government, that Mascitti was a "banker" in

a numbers operation, but they were peppered throughout with obscene language which could well have inflamed the jury (see, e.g., 2738, 2739, 2740, 2742, 2745, 2746, 2747, 2748, 2749, 2750, 2752, 2753).

Although the jurors were instructed that guilt was to be separately determined on each count (T.6728), it is difficult to see how they could avoid improperly finding Mascitti's guilt solely on the basis of the Apartment 309 evidence. However, it is unnecessary for this Court to consider issues of prejudicial spillover, since the Apartment 309 evidence was harmful beyond measure, even if the jurors considered it for only the more limited purposes for which the evidence was proffered. Thus, in summation, the Assistant U.S. Attorney argued that the Apartment 309 evidence proved Mascitti's relationship with James Napoli, Sr., a critical fact in determining Mascitti's guilt on the Hiway Lounge count (T.6048-6052). By comparing the conversations in Apartment 309 with the Hiway Lounge conversations, the Assistant U.S. Attorney also argued that the Hiway Lounge count was but a continuation of the crime charged in the 309 count (see 6088-6089, 6097, 6107-6108, 6112, 6115-6117, 6170-6172). Moreover, he also argued, and the jury was so instructed, that Mascitti's past criminal conduct -- i.e., his guilt on the Apartment 309 counts -- could be used as evidence of his intent to commit the Hiway Lounge count (T.5803-5805, 5816-5817, 6097, 6106-6108). Finally, of course, the critical presence of appellant Mascitti's voice on the Apartment 309 tapes provided

additional voice identification evidence to the jury when considering his guilt on the Hiway Lounge count -- a jury which, incidentally, acquitted a number of persons like appellant who were intercepted infrequently on the Hiway Lounge tapes, but unlike appellant, did not appear on the Apartment 309 tapes.

Accordingly, if the Apartment 309 evidence was illegally intercepted, its admission into evidence was prejudicial error on the Hiway Lounge count as well as on the Apartment 309 count, and the judgment of conviction must be reversed.

Point VI

THE PREJUDICIAL VARIANCE IN BOTH THE CONSPIRACY COUNT AND THE HIWAY LOUNGE COUNT REQUIRES REVERSAL OF THE JUDGMENT OF CONVICTION.

When the Government charges a single conspiracy, but the proof, in fact, discloses multiple conspiracies, the error of variance has been committed. United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975); see Berger v. United States, 295 U.S. 78 (1935); Kotteakos v. United States, 328 U.S. 750 (1946). Here, Judge Mishler found that the Government had alleged a single conspiracy, but proved three. We submit that Judge Mishler's conclusion is unassailable. The proof showed that the activity of the New Jersey group was unrelated in purpose, scope, and membership to the rest of the activity in this case. Moreover, according even to the Government, the single link

between the conspiracies -- Napoli, Sr. -- performed a vastly different role in the New Jersey leg (as consultant) than in the other legs. Further, the Government failed to show a link between Leg I and Leg II of the conspiracy: Agent Harker failed to connect the physical evidence, and the Government failed to prove any connection between Napoli, Sr., or any other of the Leg I defendants, with the Yonkers seizures.*

Following dismissal of the conspiracy count, all defendants moved for severances, on the ground that the same prejudice that caused the court to dismiss the conspiracy count on variance grounds required it to order separate trials on the substantive counts. Moreover, the defendants moved to dismiss Count III on the ground that it contained the same material variance as the conspiracy count. On the facts of this case, both motions should have been granted.

Since a material variance existed, the remaining question is whether appellant Mascitti was prejudiced by the joint trial.** Kotteakos v. United States, supra, 328 U.S. 750. We submit that the answer to that question can only be "yes."

The possibility of prejudice resulting from variance or misjoinder increases with the number of defendants tried and

*Not only did this prejudicial variance taint the conspiracy count, but it tainted Count III as well, for the Hiway Lounge tapes included reference after reference to the New Jersey operations as well as the other legs.

**This applies whether the question is phrased in terms of variance or failure to grant a severance. Schaffer v. United States, 362 U.S. 511 (1960).

the number of conspiracies proved. United States v. Bertolotti, supra, 529 F.2d at 156; United States v. Miley, 513 F.2d 1191, 1209 (2d Cir. 1974). "Numbers are vitally important in trial, especially in criminal matters." Kotteakos v. United States, supra, 328 U.S. at 772. Thus, in Berger v. United States, supra, 295 U.S. at 82, the Supreme Court found no prejudice, despite proof of two conspiracies in a four-defendant case. This Court, in Miley, reached a similar conclusion in an indictment charging nine defendants. See also United States v. Chong, Doc. Nos. 75-1435, 75-1440, 76-1005, slip op. 5725 (2d Cir., September 27, 1976). In contrast, prejudice was found in Kotteakos, where 19 defendants went to trial, with 13 left by the time of jury deliberations; and in Bertolotti, where 17 defendants went to trial. Here, the numbers resemble Bertolotti far more than Miley: 20 defendants went to trial, with 13 defendants charged in the Hiway Lounge count.

The number of conspiracies -- at least three -- also indicates the extensive prejudice of a joint trial. This prejudice was complicated, moreover, by the Government's peculiar and confusing decision to charge three separate substantive counts of violation of 18 U.S.C. §1955 -- in essence, three conspiracies to operate a gambling business -- against defendants alleged to be primarily part of the same leg of an overall conspiracy.

The length of the trial is also relevant in a decision as to whether a severance is required. United States v. Bertolotti,

supra, 529 F.2d at 157.

In the final analysis, of course, it is a consideration of the proceedings in their entirety that will determine whether prejudice has occurred sufficient to require a severance. Here, as a result of the Government's claim of a single conspiracy, appellant Mascitti was subjected to weeks of trial testimony relating to events in which he took no part. The Government introduced surveillance testimony ad nauseam concerning some of the New Jersey and Leg II conspirators. Moreover, the Government introduced literally cartons full of physical evidence concerning Leg II participants dismissed from the case, or indeed not in the case in the first place. See, e.g., seizure of records from Yonkers apartment (T.208-222, 4008, 5228); seizure from John Garcia and seizure from Victor Gonzalez (T.483, 494-498); seizure from Hiram Rivera (T.2076) and Peter Guido (T.512); seizure from Faustio Calderin (T.1362); seizure from co-defendant Lotierzo (T.1667-1676); seizure at Pirone's apartment, with Altese present (T.1350-1380, 1462, 1909). Finally, of course, the jury heard tape after tape involving the New Jersey operation, ultimately held irrelevant to Mascitti and all other defendants.

The manner of introducing this testimony contributed in no small way to the prejudice suffered. Much of the documentary evidence was admitted not only against the single individual specifically concerned, but subject to connection as to all defendants in the conspiracy count. Of course, when

the conspiracy count was dismissed, this evidence was held unconnected. Yet the volume of evidence was so incredible that the court below was unable to separate the evidence that should be excluded from that that was admissible.

THE COURT: Good morning -- good afternoon.

In your absence, I've dismissed count 4 of the indictment, and that means that the defendants Frank Altese, Martin Cassella, Frank Pinto, Carmine Pirone, Kenneth Rosse and Joseph Simonelli are no longer before you.

* * *

There is some evidence which related only to Count 4 which, of course, is no longer in the case. So, for example, the seizure at 100 DeHaven Drive up in Yonkers, where the items were found in a pillow case, for example, is no longer in the case.

* * *

Now, I can't think of any other evidence that should be stricken, but the point is, and the rule is, that if it was related only to Count Four and it was unrelated to any of the remaining counts, you should just disregard it.

(T.5799-5805; emphasis added.)

The court's inability or unwillingness to separate the evidence admissible on only Count IV is not surprising. The volume of irrelevant evidence introduced insured that the defendants would ultimately be buried under a sea of paper. Moreover, even if the court below had been able to separate the admissible from the inadmissible evidence by a proper charge, it is inconceivable that the jury could have put all this evidence, supposedly admitted to prove a massive numbers operation, out of mind.

As this Court wrote in United States v. Wolfson, 437 F.2d 862, 869-879 (2d Cir. 1970):

Merely to instruct the jury at the end of the case and in the charge to disregard four weeks of proof directed to stock fraud was probably an exercise in futility exemplified by Krulewitch [v. United States, 336 U.S. 440, 69 S.Ct. 716,] and Delli Paoli [v. United States, 352 U.S. 232, 77 S.Ct. 294,] and finally resolved realistically in Bruton [v. United States, 391 U.S. 123, 88 S.Ct. 1620]. In short, no matter what instructions were given, it is more than doubtful that the minds of the jury could be wiped as clean as a blackboard or slate.

Moreover, even the surveillance testimony was presented in such a way as to prejudice appellant Mascitti, since testimony regarding the three legs was admitted willy-nilly, with no discernible pattern.

In sum, even the most careful jurors would have had an impossible task separating the evidence specifically related to Mascitti from that relating to others. As this Court noted in Bertolotti, 529 F.2d at 157:

The possibilities of spillover testimony from these transactions are potent when the number of conspiracies, the number of defendants, and the volume of evidence are weighed against the ability of the jury to give each defendant the individual consideration our system requires.

Accordingly, the judgment of conviction against appellant Mascitti in Court III must be reversed.

Point VII

INSOFAR AS THEY ARE NOT INCONSISTENT
WITH ARGUMENTS RAISED HERE, APPELLANT
MASCITTI ADOPTS ARGUMENTS RAISED IN
BEHALF OF HIS CO-APPELLANTS.

CONCLUSION

For the foregoing reasons, the judgment of the district
court should be reversed and the indictment dismissed or a new
trial ordered.

Respectfully submitted,

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